

APPEAL NO. 040703
FILED MAY 18, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 13, 2004. With respect to the single issue before him, the hearing officer determined that the appellant's (claimant) compensable injury on _____, does not extend to and include bilateral carpal tunnel syndrome (CTS), degenerative changes to the cervical spine and facet joints, chronic pain syndrome, chronic lumbar radiculopathy, tibial neuropathy, sacral sensory nerve damage, rectal incontinence, high blood pressure, retinal or other ocular problems, fractured teeth – decay or loss, myofascial pain syndrome, fibromyalgia, chronic S-1 radiculopathy, and psychiatric/psychological and emotional disorders, including, but not limited to, narcotic addiction, mood disorder, somatization disorder, and depression. In his appeal, the claimant challenges the hearing officer's determination that his compensable injury does not extend to and include bilateral CTS, degenerative changes to the cervical spine, chronic myofascial syndrome/fibromyalgia, chronic lumbar radiculopathy, tibial neuropathy, rectal dysfunction, high blood pressure, tooth decay, and loss of vision in the right eye. In addition, the claimant asserts several points of procedural error on appeal. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant's compensable injury of _____, does not extend to include bilateral CTS, degenerative changes to the cervical spine, chronic myofascial syndrome/fibromyalgia, chronic lumbar radiculopathy, tibial neuropathy, rectal dysfunction, high blood pressure, tooth decay, and loss of vision in the right eye. The claimant had the burden of proof on that issue and it presented a question of fact for the hearing officer. There was conflicting evidence presented on the disputed issue. The 1989 Act makes the hearing officer the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). As such, the hearing officer was required to resolve the conflicts and inconsistencies in the evidence and to determine what facts the evidence established. In this instance, the hearing officer simply was not persuaded that the claimant sustained his burden of proving that the compensable injury extended to the conditions at issue. The hearing officer was acting within his province as the fact finder in so finding. Nothing in our review of the record reveals that the challenged determination is so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. Thus, no sound basis exists for us to disturb the hearing officer's extent-of-injury determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

In his appeal, the claimant argues that he was not given proper assistance by the ombudsman at the hearing. The claimant did not raise any objection to the ombudsman's assistance at the hearing and indeed, in response to questioning from the hearing officer, the claimant stated that he wanted to proceed with the assistance of the ombudsman. In addition, after reviewing the record, we find no evidence of the ombudsman having been anything but completely competent in her assistance of the claimant and we perceive no error. The claimant also argues that the ombudsman did not introduce all of the necessary evidence at the hearing. It was the claimant's responsibility to ensure that all of the exhibits he wanted in evidence were offered into evidence at the hearing. The claimant has not demonstrated grounds for reversal.

The claimant also argues that he did not have the right to retain an attorney in this case because he was not receiving income benefits and, as such, there was no monies from which an attorney could be paid. Although it is not entirely clear, it appears that the claimant is arguing that since 401 weeks have passed since his date of injury and he is no longer eligible for income benefits pursuant to Section 408.083, he could not retain an attorney because there was no longer even the potential to recover income benefits and, thus, there was no money from which an attorney could draw a contingency fee. Assuming that we were to find merit in the claimant's argument, it would appear that a statutory change might be required to provide relief and we are quite simply without the authority to provide any such redress.

The claimant next argues that the hearing officer erred in granting a continuance of a hearing that had been scheduled for January 14, 2004, due to the inability of the carrier's attorney to get to the site because of flight delays related to fog. Initially, we note that the claimant did not complain about the hearing officer's having granted the earlier continuance at the rescheduled hearing. Thus, he did not preserve any error for purposes of appeal. However, we note that the decision to grant a continuance is reviewed under an abuse of discretion standard, and it would be difficult to see how granting a continuance due to travel delays related to weather problems would rise to the level of an abuse of discretion.

The claimant further contends that it was error for the hearing officer to have admitted or considered any medical records that predated the _____, compensable injury because they were "obtained unlawfully" in that he did not sign a release permitting the carrier to obtain those records. The hearing officer overruled the claimant's objection. The evidence of the claimant's medical history was relevant to the extent-of-injury issue before the hearing officer and we perceive no error in the hearing officer's having admitted those records in evidence.

The claimant also asserts that the hearing officer erred in considering the compensability of the psychiatric/psychological and emotional disorders. We find no merit in this assertion. At the hearing, the claimant stated that he had never claimed that his sexual dysfunction was related to the _____, compensable injury and, as a result, the hearing officer did not address that issue. However, the claimant did not indicate that he was not pursuing a claim for the psychological/psychiatric and

emotional disorders and those conditions were specifically listed in the issue. Accordingly, we cannot agree that the hearing officer erred in resolving the issue of whether those conditions were part of the compensable injury in that that question was squarely before him.

Next, the claimant contends that the hearing officer erred in giving more weight to the carrier's peer review doctor, who testified at the hearing, than to the evidence from the doctors who treated the claimant. The claimant states that he was told that "when there was conflicting evidence presented by Claimant's treating physician and Carrier's '*Peer Review*' doctors that the [Texas Workers' Compensation Commission] had to give the treating doctor's testimony the greatest value." As the fact finder and the sole judge of the weight and credibility of the evidence under Section 410.165, the hearing officer was free to credit the evidence from a peer review doctor over the evidence from the treating doctor, where, as here, he determines that the evidence from the peer review doctor was more credible. Indeed, the hearing officer was required to resolve the conflicts and inconsistencies in the evidence and we reject the argument that it was error for him to perform his duties as the fact finder.

Finally, the claimant argues that the hearing officer was "predisposed" to the carrier, implying that the hearing officer demonstrated bias in reaching his decision. Nothing in our review of the record substantiates this assertion. Additionally, the fact that the hearing officer issued a decision adverse to the claimant does not demonstrate bias but is the prerogative of the hearing officer as the sole judge of the weight and credibility of the evidence.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TRANSPORTATION INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Veronica L. Ruberto
Appeals Judge